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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 444.

VERA ALEXANDER, ADMINISTRATRIX OF THE ESTATE OF JAMES ALEXANDER, DECEASED, ET AL.,

Petitioner,

against

SPENCER KELLOGG & SONS, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONER, NORA McEACHIN, AS ADMINISTRATRIX.

LESTER HAND JAYNE,
Proctor for Claimant-Petitioner,
NORA McEACHIN, as Administratrix, etc.

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Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 444.

VERA ALEXANDER, Administratrix of of Estate of James Alexander, deceased, *et al.*,

Petitioner,

AGAINST

SPENCER KELLOGG & SONS, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONER, NORA McEACHIN, AS ADMINISTRATRIX.

Statement.

A writ of certiorari was granted herein to certain petitioners, including Nora McEachin, as Administratrix of the Estate of her deceased husband, Henry A. McEachin, as to the decision of the Circuit Court of Appeals for the Second Circuit, which affirmed a final decree of the United States District Court for the Southern District of New York in Admiralty, which was entered on the decision of Judge Patterson on February 25th, 1931. This decree dismissed the claim of Nora McEachin, as Administratrix, on the ground that her sole relief was under the Workmen's Compensation Act of the State of New Jersey. The writ of certiorari granted to Nora McEachin, as Administratrix, was likewise granted to Vera Alexander, as Administratrix, and thirty

other claimants. A writ of certiorari was likewise granted to the respondent here to review the correctness of the decree in denying limitation to the owner of the launch upon the ground that the owner was privy to the negligence causing this disaster.

The husband of the claimant was drowned when the "Linseed King" sank in the Hudson River on December 20th, 1926. The owners of the "Linseed King" initiated this limitation proceeding in admiralty on March 4th, 1927. The trial of the issues was duly had before District Judge Hazel, terminating on February 1st, 1928, and the owners of the "Linseed King" were held liable without limitation, and all the claimants were directed to proceed with their proof as to their claims before Myer Nussbaum, as Special Commissioner. The hearings upon the claims of the many claimants extended from May 15th, 1928, down to May 27th, 1930. The Commissioner in his report filed on July 9th, 1930, made an award in favor of Nora McEachin, as administratrix, as damages for the death of her husband. The Commissioner's award was reviewed on exceptions by District Judge Patterson on February 25th, 1931. By the final decree entered on the decision of Judge Patterson, the claim of the widow was dismissed. The Circuit Court of Appeals for the Second Circuit affirmed the decree below with an opinion by Judge Learned Hand.

Opinions Below.

The opinion of Hazel, *D. J.*, on the merits may be found at page 122, Vol. I of the record, and is reported in 24 Fed. (2d) 967.

The opinion of Patterson, *D. J.*, is at page 180 of Vol. I of the record, and is reported in 48 Fed. (2d) 311.

The opinion of the Circuit Court of Appeals by L. Hand, *J.*, is at page 2365 of Vol. IV of the record, and is reported in 52 Fed. (2d) 129.

Statement of Facts and Specification of Assigned Errors,

The claimant herein will rely, for the sake of brevity and convenience, upon the statement of facts and assignment of error in the brief of Lucien V. Axtell and Elizabeth Robinson, proctors for petitioners.

POINT I.

The ship-owner here not only chose its own forum, but compelled the claimant by legal process to accept this forum, which exercised jurisdiction, and positively restrained the claimants from proceeding elsewhere, for a period lacking a few days of four years in time.

The foregoing statement is demonstrated by an examination of the petition for limitation and the restraining order and monition issued in accordance therewith. The prayer of the petition, paragraphs "3" and "4", at page 3, Vol. I, asks:

"That the Court make an order directing the issuance of a monition to all persons claiming damages for all and any loss, damage or injury sustained as a result of the sinking of Motorboat 'Linseed King' upon the voyage described in the Third Article of this petition, citing them to appear before a Commissioner to be named by the Court in said order, and to make due proof of their respective claims and also to appear and answer the allegations of this petition according to law and the practice of this Court, at or before a set time to be fixed by the Court.

"That the Court on filing of such stipulation as may be determined to be proper, or on the filing of an *ad interim* stipulation, will issue its injunction restraining the prosecution and determination of all actions, suits and proceedings already begun to recover for damages

sustained on the voyage aforesaid, and the commencement or prosecution or determination hereafter of any suit, action or legal proceedings of any nature or description whatsoever, except in the present proceeding, against the petitioner or against the Motorboat 'Linseed King' or her pending freight in respect of any claim or claims arising out of the aforesaid voyage, with liberty, however, to any claimant to file his claim with the New Jersey State Workmen's Compensation Bureau."

The petitioner then goes on to pray that there be a limitation to the amount or value of the petitioner's interest in the motorboat "Linseed King" at the end of the voyage, and expressly prays that if there shall be any proper and legal claims under the New Jersey Workmen's Compensation Law, that these claims shall be limited as well to their proportionate share in the value of the petitioner's interest in the motorboat "Linseed King" after the disaster. (Page 8, Vol. I.)

The Order appointing the Commissioner and enjoining suits ordered:

"That the beginning or prosecution or determination of any and all claims, suits, actions or legal proceedings of any nature or description whatsoever except in the above entitled proceeding in respect of any claim arising or resulting from sinking of Motorboat 'Linseed King' on December 20th, 1926, while engaged in carrying persons from the foot of 95th Street, North River, Manhattan, to Edgewater, N. J., or out of any other matter connected with the voyage on which the said Motorboat 'Linseed King' was then engaged, be, and they hereby are, stayed and restrained until the hearing and determination of this proceeding, with liberty, however, to any claimant to file his claim with the New Jersey State Workmen's Compensation Bureau, and it is further

"Ordered that service of this order as a restraining order be made within this district in the usual manner and in any other district by the United States Marshal for such district by delivering a certified copy of this order to the person or persons to be restrained or to his

or their proctors or attorneys, and to the New Jersey State Workmen's Compensation Bureau by delivering a certified copy of this order to the Secretary of said New Jersey State Workmen's Compensation Bureau." (Page 22, Vol. I, R.)

There was a further restraining order to the same effect. (Page 26, Vol. I, R.)

The monition directed all persons claiming damages for any loss, damage or injury or destruction occasioned by said alleged disaster or in connection with the voyage on which the Motorboat "Linseed King" was then engaged to appear before said Court and make due proof of their respective claims. (Page 30, Vol. I, R.) The restraining orders were continued by the interlocutory decree of Judge Hazel, dated the 26th day of March, 1928. (Page 145, Vol. I, R.)

It is to be noted that the various orders permitted the filing of a paper setting forth the claim of a claimant with the Workmen's Compensation Bureau of New Jersey, but this provision was an empty gesture, in that the claimant as well as the Workmen's Compensation Bureau itself were expressly restrained from the prosecution of any claim, so that the filing of the paper was a formality without substance in the gaining of any actual relief.

POINT II.

The right of a ship owner, at his election, to invoke the aid of the limitation of liability statutes in admiralty, is not restricted by the provisions of the Compensation Law in any State.

Section 2 of Article 3 of the Constitution of the United States provide that the judicial power of the United States shall extend

"to all cases of admiralty and maritime jurisdiction."

The Limitation of Liability Act of March 3rd, 1851, as amended, provides that

> "the liability of the owner of any vessel * * * for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners shall in no case exceed the amount or value of the interest of such owner in such vessel."

This enactment by Congress, in accord with the grant of constitutional power, has always been given the fullest scope. It has been held to apply to all claims, whether these claims are, or are not, liens in admiralty, or claims of strictly admiralty origin.

Hartford Accident v. *Southern Pacific,* 273 U. S. 207.

State Compensation Laws have been permitted to have authority in certain cases where the character of the employment was non-maritime and where the employer, if a ship owner, did not seek to avail himself of the protection of the Limitation of Liability Acts. Yet, nevertheless, it was early recognized by this Court that the inconsistency of the Compensation Acts does arise in the event of the intervention of limitation of liability proceedings. Mr. Justice McReynolds observed in *Southern Pacific* v. *Jensen,* 244 U. S. 205, at page 218, as follows:

> "The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction. * * * And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884. (Rev. Stats. Sec. 4283-4285 * * * which declare a limitation upon the liability of their owners."

The fact that a State Statute, enacted subsequent to the Federal Limitation of Liability Act, cannot be permitted to over-ride is provisions, and thus over-ride the protection therein given to ship owners, is best indicated by the decision of this Court as to a Federal Statute. This statute was apparently designed to make the claims of injured seamen an exception to the comprehensive scope of such limitation proceedings. This Statute, popularly known as the "Jones' Act", was the Merchant Marine Act of June 5th, 1920. (Chap. 250, Sections 33, 41, stat., 988, 1,007.)

This Act provided that any seaman suffering personal injury, or his representative in case of death, should have the right of an action at law, with the right of trial by jury, and have the further benefit of certain Statutes of the United States enacted for the protection of railway employees. Although this was a Statute of the Federal Congress, rather than the enactment of any single State, it was held by this Court, "In the Matter of the Petition of the East River Towing Company, Inc., *re* the steam tug 'Edward'," 266 U. S. 355, that the election of the ship owner, to invoke the benefit of the Limitation of Liability Act, deprived the seaman of any inconsistent rights, which he might otherwise pursue under the "Jones' Act". The Court held:

> "The choice of a jury trial is given when things take their ordinary course, not to break in upon the settled mode of adjustment when the ship is given up."

The Court prefaced this observation with the following comment:

> "If there is no surrender of the ship, which we presume is made relatively rarely, the limited liability statutes play no part."

The Court further adds that

> "no sufficient reason is offered for the extraordinary preference over other claims that would be given to seamen were the decree of the District Court sustained."

(The District Court decree vacated the restraining order against the continuance of the suit.)

The reasoning of the Court in the foregoing case, as to the inconsistent provisions of the "Jones' Act" in the event of limitation of liability, would seem to apply with equal cogency to the inconsistent provisions of a State Compensation Act, in a case where the ship owner elects to limit liability. As to the rights of employees of ship owners arising, in such event, under the State Compensation Act, it can likewise be said that apart from the surrender of the ship, the Limitation of Liability Statutes would play no part, but, in the event that there is a proceeding instituted by the ship owner to limit liability, these State Compensation Statutes are "not to break in upon the settled mode of adjustment when the ship is given up." So, likewise, it can be said, that "no sufficient reason can be given for an extraordinary preference" of claims of employees under the Workmen's Compensation Act over other claims against the ship owner.

The acceptance of the foregoing view that the provisions of the Limitation of Liability Act prevail over the New Jersey Statute as to Workmen's Compensation was made by the petitioning ship owner at the outstart. The petitioner not only asserted the right to so limit Workmen's Compensation claims in this proceeding at that time, but it is still seeking by a reversal in this Court, to secure this very relief by a limitation of liability against all claimants, including those whose claims allegedly arise under the Workmen's Compensation Law. The petitioner, therefore, should be the last one to deny the assertion that in so far as the Workmen's Compensation Act is inconsistent with the Federal Act for the limitation of liability, the Compensation Act must give way. The petitioner is, in equity, estopped to deny that the Admiralty Court, pursuant to the Limitation of Liability Act, has the very powers which the petitioner not only urged but procured the Court to exercise in its behalf, and pursuant to which it is still seeking limitation.

POINT III.

Having once elected to compel all claimants to enter into concourse in a limitation of liability proceeding, the jurisdiction so invoked by the ship owner is comprehensive and conclusive in scope and all inconsistent provisions of a State Workmen's Compensation Act must give way before the equitable power of the court.

If the fact be granted, as seems almost self-evident, that a limitation of liability proceeding embraces claims otherwise relegable to Workmen's Compensation, as well as all others, then the question arises as to whether there is not an unsolvable conflict between the carrying out of the provisions of the Workmen's Compensation Law in the Admiralty Court and the carrying out of the provisions of the Limitation of Liability Act. There is such an unsolvable conflict.

In the first place, the intendment of the Workmen's Compensation Law is that the workman, who shall suffer injury by the act of a negligent employer, shall surrender the right to a full award by jury trial, with all the attendant expenditures for lawyers and litigation and the hazard of various defences and the protracted delay entering into such a situation, for a fixed lesser amount to be paid in installments from the outstart, without the necessity of employing lawyers, without the necessity of litigating the issue of the employer's negligence, and without the necessity of delay for a long period of time. The employee surrenders the right to a full award, although the facts in his particular case might warrant a full recovery upon a trial. In return for this, he receives a lesser amount, free from delay, free from outlay and expenditures for litigation, and free from the necessity of litigating the issue of negligence. If the right of the ship owning employer to bring a claimant under such a Work-

men's Compensation Act into concourse with other claimants in a limitation of liability proceeding is granted, it is obvious that every intendment of the Compensation Act in favor of the employee, and in return for which the employee surrendered his common law right, is defeated in toto. The employee can not then sit idly by and permit the employing ship owner to prevail in its contention that there was no negligence on the part of the owner. The employee would thus be excluded from any benefit, except, at best, to share in the value of the wreck. The employee perforce must litigate the issue of negligence in a court of admiralty law. The employee must, therefore, employ an attorney and undergo the expenditures and hazards of litigation. The employees likewise must forego any compensation whatever for a protracted period of time. He is denied immediate installment payments of any fixed award.

Certainly, the carrying out of the provisions of the limitation of liability act squarely and completely contradict the carrying out of the provisions of the Workmen's Compensation Act, so far as the rights of the employee are concerned. The same holds true as to the rights of the employer under the Compensation Act. Under compensation statutes, the employer must pay fixed amounts, irrespective of his negligence, from the very outstart. If the employer, however, is a ship owner and elects to avail himself of the Limitation of Liability Acts, he may litigate the issue of negligence, and he may avoid the fixed payments from the outstart, and he may avoid any payments at all beyond the value of the wreck of his vessel.

There are further unsolvable conflicts that arise upon the happening of various contingencies. Assume that the ship owner prevails and its liability is limited to the value of the wreck and pending freight, after the disaster. Assume that some of the claimants are in the category of those, who would have had, but for the ship owner's act in limiting liability, compensation claims. Assume that there are other claims of a strictly admiralty nature. The fund is to be distributed

proportionately among these various claimants. It is impossible for such distribution to take place, if the Admiralty Court, although an equity court with power of complete adjudication of the entire controversy, is obliged, at the end of protracted litigation in admiralty, to send the compensation claimants back to the Compensation Bureau for a determination of the amount of their respective awards. There is no way that the present value of certain compensation awards may be arrived at. A widow, for example, is to receive weekly payments of certain amounts until she remarries. (Chapter 95, Sec. 2, par. 12, N. J. Laws of 1911.) Surely, it is not feasible that the admiralty court and the remaining claimants entitled to share in the fund shall be required to await the outcome of this contingency to determine the widow's proportionate share in the fund, which is a necessary antecedent to distribution. Other contingencies may arise under the Compensation Act. Dependent parents and grandparents are to receive weekly compensation only for that period when they are over forty. Children are only to receive weekly compensation until they are sixteen years of age. (See Sec. cited, *supra.*) Compensation is to be computed according to the number of dependents that there are to be compensated. The contingencies arising under such provisions can often only be determined by the happening of the event. Certainly, it is not feasible, in a Limitation of Liability proceeding, to give effect to such provisions in a Compensation Act, and require the remaining claimants to await the period of sixteen years, or a lifetime, before arriving at the proportionate shares necessary in order to make a distribution of the fund.

It is utterly inequitable, on the other hand to carry out the terms of the Compensation Act, if the ship owner does not prevail in the limitation of liability proceeding, and if, as in the case at Bar, the claimants prevail. Can it be considered equitable in such case, for such claimants to be required to accept the lesser awards provided for in compensation schedules, rather than the full award of the court

upon the determination of the facts in their particular case, in the very court wherein the claimants have been obliged to litigate and establish the very facts entitling them to a full award, and wherein the claimants have undergone the full burden of expense, hazard and delay incident to such litigation? Surely, claimants forced to go through such a procedure should not be obliged to accept the lesser awards which compensation provides, which are designedly smaller for the reason that the claimants have been freed from the burden and delays of litigation. They have not forgone the litigation. Neither should they forego the full award.

Under well-settled principles of the conflict of laws, extra-territorial effect will not be given to the Statutes of a State when these Statutes are in direct conflict with the Statutes or law of the jurisdiction where the case is tried. In the event of such a conflict the Statute of the jurisdiction is to prevail. The doctrine of comity must yield to the positive law of the land. The state law must give way when in conflict with the statutes of the federal forum or the settled current of its judicial decisions. State laws should not be given effect when to do so would be contrary to the settled public policy of the forum.

See:

Hervey v. *Rhode Island Locomotive Works*, 93 U. S. 664;
Green v. *Van Buskirk*, 5 Wall. 307;
Pennoyer v. *Neff*, 95 U. S. 714;
Watson v. *Murray*, 23 N. J. Eq. 257;
Despard v. *Churchill*, 53 N. Y. 192.

The Federal Acts for limitation of liability are directly in conflict with the carrying out of the Workmen's Compensation Law of New Jersey. The petitioner here has elected to invoke the acts for limitation of liability. There has been an election of remedies. The interference of a State Workmen's Compensation Law with the carrying out of the Limitation of Liability Act is an interference with the provisions

and powers of the Federal Constitution from which the Limitation of Liability Acts derive their efficacy, and so far as the New Jersey Compensation Statute interferes with the Acts for the Limitation of Liability, the New Jersey Statute must give way.

The learned Justice writing the opinion of the Circuit Court raises the question of the extraterritorial effect to be given to the contract implied by the terms of the New Jersey Workmen's Compensation Act, and points out that the Courts of the State of New York have given the implied contract arising from this act extraterritorial effect in so far as the Courts of the State of New York are concerned. The learned Justice observes as to this New York decision, written in the case of *Barnhart* v. *American Concrete Steel Co.*, 227 N. Y. 531, that

> "It establishes the law of New York and while strictly it may not be controlling upon us, we can see no reason for not following it here. Certainly, there is no such clear current of authority, which could justify our declaring that there was any principle of 'general law' to the contrary."

It is respectfully submitted that the learned Justice is in error in failing to see any reason for not following this New York case in this Admiralty proceeding.

If the New York law is not directly controlling upon the Federal Courts in this situation, as the learned Justice concedes, why then should it be followed when the trend of reason and the trend of equity in the particular case at bar is to the contrary? While it is true that the disaster in suit occurred in the jurisdiction of the State of New York, it likewise occurred in another concurrent jurisdiction. The concurrent jurisdiction was that of the United States and of its Courts over tidal waterways, and the occurrence in suit was one to a ship upon these tidal waterways, and when the ship owner of its own motion elected the jurisdiction of the Courts of Admiralty of the United States, the question of whether or not the law of New York extends extraterritoriality to the Work-

men's Compensation Act of New Jersey is a secondary consideration to the question of whether or not the law of the United States should extend extraterritoriality to the Workmen's Compensation Law of New Jersey under such circumstances. Considering the problem of extending extraterritoriality to the New Jersey Workmen's Compensation Act from this viewpoint, it is apparent that there is a clear current of authority contrary to such extension of the Compensation Act. This current of authority starts with the provisions of the Limitation of Liability Acts as such, which are contradictory to the carrying out of the Compensation Act in this Court, finds support in every equitable principle, and ends with the opinion of Mr. Chief Justice Taft in the case of *Hartford Accident Co.* v. *Southern Pacific*, 273 U. S. 207.

POINT IV.

The case of Hartford Accident Company v. The Southern Pacific, 273 U. S. 207, is controlling in principle upon the case at Bar as to the claimant's rights.

Counsel has carefully read, many times over, the decision of Mr. Justice Taft in the case of *Hartford Accident Company* v. *The Southern Pacific*, 273 U. S. 207, and cannot understand why this decision is not directly in point and controlling in principle upon the case at Bar. It is true that the decision does not specifically refer to any Workment's Compensation claims as having been among the claims in that proceeding. It is, nevertheless, clear, that the case enunciates the principle, that whoever is brought in to a limitation proceeding, by reason of being entitled to money damages for any cause against the ship owner, is entitled, after having been so brought into concourse, to have his rights finally determined in the admiralty proceeding, which the petitioner has compelled him to enter.

In that case, the oil tank barge Bolikow exploded, causing a fire, giving rise to claims for damages to other vessels and death and injuries to certain persons. The owners of the Bolikow filed a petition for limitation of liability, bringing all the claims into concourse. The limitation of liability proceeding was contested and the right to limitation of liability was disproved and denied. Thereupon, the Hartford Accident Company, as the stipulator for value, sought to be relieved of liability upon the bond, asserting that the claimants were relegated to those rights, which they possessed before the limitation of liability proceeding was instituted. Mr. Justice Taft, in writing the opinion of the Court, clearly enunciated the effect upon the rights of claimants of the institution of a limitation of liability proceeding, and the following is what he said upon the matter:

"It is surprising that no case has ever arisen in which the question here mooted has been directly decided, though the effect of a decision refusing limitation has been the subject of discussion in the Titanic, 204 Fed. 295, and in the Virginia, 266 Fed. 437, 439. See also Dowdell *v.* U. S. District Court, 150 Fed. 444; *In re* Jeremiah Smith & Sons, 193 Fed. 395; The Santa Rosa, 249 Fed. 160.

"The history and proper construction of the Limitation of Liability Act of 1851, 9 Stat. 635; now embodied in Revised Statutes Sections 4282 to 4287, are shown in a series of cases in this court, the chief of which is the Norwich Company *v.* Wright, 13 Wall. 104. Further consideration to this subject was given by the Court in The Benefactor, 103 U. S. 239; in the Providence & New York Steamship Company *v.* Hill Manufacturing Company, 109 U. S. 578; in the City of Norwich, 118 U. S. 468, 503; in The Scotland, 118 U. S. 507; in Butler *v.* Boston & Savannah Steamship Company, 130 U. S. 527; in *In Re* Morrison, 147 U. S. 14, 34; in The Albert Dumois, 177 U. S. 240; in The Hamilton, 207 U. S. 398, and in the La Bourgogne, 210 U. S. 95.

"These decisions establish, first, that the great object of the statute was to encourage shipbuilding, and to induce the investment of money in this branch of

industry, by limiting the venture of those who build the ships to the loss of the ship itself or her freight then pending, in cases of damage or wrong, happening without the privity or knowledge of the ship owner, and by the fault or neglect of the master or other persons on board; that the origin of this proceeding for limitation of liability is to be found in the general maritime law, differing from the English maritime law; and that such a proceeding is entirely within the constitutional grant of power to Congress to establish courts of admiralty and maritime jurisdiction, Norwich *v.* Wright, 13 Wall. 104; that to effect the purpose of the suit, Admiralty Rules Nos. 54, 55, 56 and 57 (now 51-54; Sec. 264; U. S. Appendix, p. 25) were adopted, by which the owner may institute a proceeding in a United States district court in admiralty against one claiming damage for the loss, in which he may deny any liability for himself or his vessel, but may ask that if the vessel is found at fault his liability as owner shall be limited to the value of the vessel, as appraised after the occurrence of the loss, and the pending freight for the voyage; that these damages shall include, damages to goods on board, second, damages by collision to other vessels and their cargoes, and, third, *Any other damage or forfeiture done or incurred; that all others having similar claims against the vessel and the owner may be brought into concourse in the proceeding, by monition, and enjoined from suing the owner and vessel on such claims in any other court; that the proceeding is equitable in its nature and is to be likened to a bill to enjoin multiplicity of suits,* Providence Steamship Co. *v.* Hill Manufacturing Company, 109 U. S. 578; that, by stipulation after appraisement, the vessel and freight may be released and the stipulation be substituted therefor; that, on reference to a commissioner and the coming in of his report, it shall be determined, first, whether the owner and his vessel are liable at all; second, whether the owner may avoid all liability except that of the vessel and pending freight; third, what the amount of the just claims are, and fourth, how the fund in court should be divided between the claimants. The cases show that the court may enter judgment *in personam* against the owner as well as judgment *in rem* against the *res* or the substituted fund, City

of Norwich, 118 U. S. 468, 503; that the fund is to be distributed to all established claims to share in the fund to which admiralty does not deny existence, whether they be liens in admiralty or not, The Hamilton, 207 U. S. 398, 406; and that they may include damages from a collision, from personal injuries, Butler *v.* Boston Steamship Co., 130 U. S. 527, or for wrongful death, if arising under a law of Congress, a State of the Union or a foreign state, which is applicable to the owner and the vessel. The Bourgogne, 210 U. S. 95, 138.

"It is quite evident from these cases that this Court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and *that all the ease with which rights can be adjusted in equity is intended to be given to the proceeding. It is the administration of equity in an admiralty court.* Dowdell *v.* United States District Court, 130 Fed. 444, 445. The proceeding partakes in a way of the features of a bill to enjoin the multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill. *It looks to a complete and just disposition* of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person. The City of Norwich, 118 U. S. 468, 503.

"With this general view of the statute, we come to the contention of the petitioner in this case. He says that the owner only brings the suit to limit his liability, if it exists, to the vessel and the freight for the voyage. If he fails in his purpose and does not establish the limitation, no progress can be made in behalf of the defendant or of claimants in the collection of what has been found due them; because he has lost that feature of his suit against them, the case must be dismissed. *This is said to follow, even though it is apparent that by virtue of the owner's suit and the injunction he secured he has delayed and prevented his creditors from resorting to any other forum to vindicate their rights against him.* In this view the defendant and the claimants thus may not thereafter share in the fund or *res*, the deposit of which for the benefit of the defendants and the claim-

ants was the principal ground and the indispensable condition of the proceeding. The parties, it is argued, must thereafter be remitted to a common law or equity court of the State to secure their rights, unless diverse citizenship or the admiralty character of their claims entitles them to resort to, or remain in, a federal court.

"Surely, the admiralty court, in view of the large powers intended to be given it in such a proceeding, is not so helpless as this. So to hold would be to hold that, unless the petitioner wins, the court does not have power to administer justice. There is nothing in the suit, nor in the rules, that requires so feeble a conclusion. The jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of the *res* put by the petitioner into his hands. *The court of admiralty, in working out its jurisdiction, acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the res and by judgment in personam against the owners, so far as the court may decree. It would be most inequitable if parties and claimants, brought in against their will and prevented from establishing their claims in other courts, should be unable to perfect a remedy in this proceeding promptly, and should be delayed, until after the possible insolvency of the petitioner, to seek a complete remedy in another court, solely because the owner cannot make his case of personal immunity.* 1 Benedict's Admiralty, 5th ed., 488. *If Congress has constitutional power to gather into the admiralty court all claimants against the vessel and its owner, whether their claims are strictly in admiralty or not, as this court has clearly held, it necessarily follows as incidental to that power that it may furnish a complete remedy for the satisfaction of those claims by distribution of the res and by judgments in personam for deficiencies against the owner, if not released by virtue of the statute.*

"Such a conclusion is quite in accord with the rules governing equity procedure in general conformity with which this limitation of liability statute has been construed and enforced. Where a court of equity has obtained jurisdiction over some portion of a controversy, it may and will in general proceed to decide the whole

issues and award complete relief, even where the rights of parties are strictly legal and the final remedy granted is of the kind which might be conferred by a court of law. 1 Pomeroy's Equity Jurisdiction, 4th ed., Secs. 187 and 231; United States *v.* Union Pacific Railway, 160 U. S. 1, 52. See also Equity Rule 10, amended May 4, 1925, 268 U. S. 700, Appendix. Of course, this equitable rule enlarging the Chancellor's jurisdiction, in order to completely dispose of the cause before him, does not usually apply in an admiralty court. Grant *v.* Poillon, 20 How. 162; Turner *v.* Beacham, Taney's Reports 583, Federal Case No. 14252; The Pennsylvania, 154 Fed. 9; The Ada, 250 Fed. 104. *But this limitation of liability proceeding differs from the ordinary admiralty suit, in that, by reason of the statute and rules, the court of admiralty has power* (Providence Steamship Co. *v.* Hill Manufacturing Co., 100 U. S. 578) *to do what is exceptional in a court of admiralty—to grant an injunction, and by such injunction bring litigants, who do not have claims which are strictly admiralty claims,* into the admiralty court. Benedict on Admiralty, 5th ed., Sec. 70, note 97. *There necessarily inheres, therefore, in the character of the limitation of liability proceeding, in reference to such non-admiralty claims, the jurisdiction to fulfil the obligation to do equitable justice to such claimants by furnishing them a complete remedy."*

The Court, in conclusion, said:

> "That litigation, as we have seen, may properly be carried to a complete settlement of all claims, without regard to whether the prayer for limitation of liability is denied or not. The stipulator must, therefore, pay in full on his undertaking to enable the court to pay the costs and make the pro rata distribution."

Counsel has italicized certain parts of the foregoing opinion.

POINT V.

The application of the Statutory Compensation Plan of New Jersey could arise only in the event of a contract between the employer and the employee, and such contract, if made, was vitally breached, repudiated, waived and rescinded by the act of the petitioning employer, and the petitioner is now in equity estopped from further reliance thereon.

The foregoing contention as to the situation between the petitioner and the alleged employees first arose in the District Court, when the petitioner averred before Mr. Justice Patterson, on the review of the Commissioner's decision, that there was a contract between the employer and the employee to accept the plan of the New Jersey Workmen's Compensation Act, which the widows and children of the decedents could not break.

Counsel for the claimant, Nora McEachin, countered this averment in a brief submitted to Judge Patterson, by observing that the employer had surrendered its right to enforce any such alleged contract when the employer itself breached the contract in its entirety, by invoking the contest as to negligence and as to limitation in the Admiralty Court, and by enjoining the Workmen's Compensation Bureau of New Jersey from undertaking to carry out the contract. Counsel urged that the employer, having initially breached the contract, could not then turn around and demand that the other parties to it be bound. Judge Patterson requested further briefs upon this issue, and a discussion of this issue appears in the lengthy opinion of the District Court, and in the lengthy opinion of the Circuit Court.

The New Jersey Workmen's Compensation Plan, which is Chapter 95 of the Laws of 1911 of New Jersey, as subse-

quently amended, is as set forth in Section II of the Act, an elective and contractual provision. Section II is entitled "Elective Compensation", which provides in the first paragraph of the Section, which is the seventh paragraph of the Act:

> "When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer, without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, * * *."

The next succeeding paragraph, which is the eighth paragraph of the Act and the second paragraph as to elective compensation, describes the agreement which the employer and employee shall make, and says that "such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act."

The next paragraph of Section II provides that every contract of hiring shall be presumed to include this agreement.

The opinion of the Circuit Court states that, according to the views of the courts of New York and New Jersey, the contract so made is to be treated, in law, as a reality and not as a mere fiction. Of course, this contract is a two-sided agreement of surrender. Not only does the employee agree to surrender all his other rights, but the employer likewise agrees that it will surrender all of its other rights.

In the absence of the Compensation Act, or of a valid agreement to be bound by it, the employee has the benefits of the common law and its statutory amendments, which are expressly stated in Section I of the New Jersey Compensation Act entitled, "Compensation by Action at Law". The rights by action at law are specially stated as being existent and continuing by Section I of this very Act itself.

The nature of the agreement made between employer and employee is as specifically described in Provision 8 of Section 2 of the Act, where it is stated that such an agreement shall comprise a surrender by the parties thereto of their rights to any other, method, form or amount of compensation or determination thereof. It is an agreement, therefore, not to proceed with any other form of determination of the controversy. This being the agreement made by the employer, the answer to the question as to whether or not the employer breached the agreement is a rather obvious one. The employer breached the agreement in toto. The employer did not live up to a single element of the agreement. The employer did those very things which it was of the essence of the agreement that it would not do. The employee agreed to give up his right to the action at law because by the like surrender of rights at law by the employer, the employee was saved from the burden of litigating the issue of negligence, and from the consequent burden of employing counsel and paying attorneys' fees and disbursements, and the further burden of waiting over a period of years for the outcome of the litigation without receiving any immediate reimbursement. If the employer proposed to litigate the issue as to its negligence, what was the benefit to the employee of the agreement? If the employer was going to compel the employee to wait four years without a penny of compensation, what was the benefit to the employee of the agreement? If the employer was going to compel the employee to hire lawyers and fight a protracted legal battle of unusual magnitude, what was the benefit to the employee of the agreement? Yet, the employer did do these very things which have been related here.

It has been urged by the petitioner below that the right of the ship owner and employer to litigate, in this fashion, is analogous to the right of the ship owner to limit liability where there is an agreement in a bill of lading as to the value of certain goods. Arguing from this analogy, it is urged that a party to a contract can always litigate the question as to what the contract means. The right to litigate as to the mean-

ing of some contracts, without thereby giving rise to a breach of the contract, is to be conceded. There is one contract, however, which parties can make with each other, where the act of litigation by one of the parties gives rise to a breach of the contract. The contract where this occurs is where the very contract which the parties make with each other is an agreement not to litigate. Having made an agreement not to litigate, how can a party to such an agreement proceed to litigate, without a breach of the very contract which it has made? The employer here did the very thing that it agreed that it would not do. By its own act the employer even went so far as to prevent the employee from requiring the employer to do the slightest thing under its agreement.

It is elementary law that the anticipatory breach of a contract arises by the refusal of one of the parties to perform the contract, amounting to an absolute and unequivocal repudiation, or that the breach may arise by an act of a party to the contract, making performance on the part of such party impossible. We have both kinds of a breach in the case at Bar. The employer refused to perform his contract not to litigate the issue as to negligence, because it did litigate it before Mr. Justice Hazel. The employer refused to perform its contract to pay the employee and his representatives currently, in installments, from the inception of the injury, by enjoining the claimant from securing it, and by enjoining the Bureau from awarding it. The employer refused to perform its contract not to compel the employee to resort to lawyers and a protracted litigation by carrying on one of the most extensive litigations, with respect to a negligence claim, extant at the present time.

The employer breached the contract by an act rendering performance on its own part impossible, when it proceeded to litigate the question of negligence. This it agreed not to do. Having done this very thing, the employer had done an act, which made it impossible for him to perform his contract. The employer prevented the employee from being allowed compensation for the period of four years. This was

the reverse act from the act which it had agreed to perform and rendered performance on its part impossible. The employer compelled the employee to enter an extensive litigation, when this was one of the very things the employer agreed to surrender. This compulsion was another act rendering performance impossible on the part of the employer.

One test of whether a contract has been breached is whether or not the party charged with the breach can carry out the contract which he made. It is respectfully submitted that the employer cannot carry out the contract which he made. The employer agreed to pay from the outstart, to waive the issue of negligence, and to pay without litigation at law. Five years have elapsed. The employer has paid nothing. It has raised the issue of negligence and it has litigated to the nth degree. It is putting it very mildly to say that the employer breached the contract to give compensation under the Jersey Act. The employer fairly annihilated every element of this contract. There is nothing that the employer agreed to refrain from doing, which it has not done. There is nothing that the employer agreed that it would do that it has not failed to do, and the employer has even gone further than that. The employer, not satisfied with its action and non-action, in contradiction of its contract, went one step further and prevented the other party to the contract from doing any act at all in furtherance of the rights which the employer promised it.

As to the foregoing reasoning, Judge Patterson, in the opinion written in the District Court, said, at page 192, folio 575:

> "I own that at first this line of reasoning struck me as sound. There is no gainsaying the fact that the conduct of the petitioner has been in violation of its contractual duty under the New Jersey compensation plan. It asked for and obtained an injunction which, while permitting the filing of compensation claims in New Jersey, obstructed any further progress along that line for a considerable time. One of the valuable features of

workmen's compensation is the speedy relief given to injured employees and to dependents of employees who are killed, without putting them to litigation beyond what may be involved in the determination of claims by the compensation board and in appeal from such determination."

It is clear from this quotation that the learned District Judge accepted all the premises in this chain of reasoning, although he then rejected the conclusion. The learned Judge observes at folio 576, page 192, Vol. I:

"But the conclusion that the employees were thus remitted to their rights at common law or under death statutes does not follow."

The learned District Judge then gives the following explanation for rejecting the conclusion, while accepting the premises. (Fols. 576-579, Pages 192-193, Vol. I.)

"The general rule is that where a claim has been released for a promised consideration, which is not given, the claimant may treat the release as rescinded and recover upon the original claim. Williston on Contracts, sec. 1457. This rule might be applicable here if the employees had at one time had claims in tort against the employer, which claims they had surrendered upon making contracts for the payment of compensation, and if the employer had later declined to pay the promised compensation. But under the New Jersey statute and the contract resulting from it, they never had claims in contract for injury or death except their claims under the compensation plan. They certainly had no claims for injury or death prior to December 20, 1926, and before that time came they had made an agreement surrendering all other rights than the right to get workmen's compensation awards. So they are not asking the Court to revive claims which they once had at common law, in admiralty or under a death statute; they are in effect asking the Court now to create for them claims which they never owned, claims which they could have had but for the compensation act and the resulting contract. I conclude that there is no room here for the rule of

rescission. The remedy for the petitioner's breach of contract is to hold it for interest upon the delayed payments of compensation, and I have no doubt that the Compensation Bureau will attend to this matter in making awards."

It is respectfully submitted that the foregoing reasoning of the District Court is incorrect. In the first place, the reasoning starts with the adoption of a rule from Williston on Contracts which is simply of too narrow a category in words to include the situation at bar. It is true that where a "claim" is released for a promised consideration, which is not given, the claimant may treat the release as rescinded. But, because there was no existent *"claim"* when this agreement at bar was made, is there then no existent principle? The principle has not changed. It is a principle which applies and attaches to a far wider category than *"claims"* as stated in the sentence taken from Williston. One who surrenders his *"claim"* for a consideration which fails receives back his claim. Is there any valid reason why one who surrenders or agrees to surrender his right in law for a consideration should not receive back his right and be released from his surrender of it, if the consideration fails? The principle involved is broader than the category of "claims" which are the subject matter of Mr. Williston's quotation. The situation here can not be compressed so as to fit the narrower subject matter of that quotation.

A rescission places the parties where they were *ab initio* wherever this is possible. You could not have an instance of a rescission where it would be easier to place the parties in their original position than the instance that exists here. In many cases of rescission, one has altered merchandise or other tangible concrete things to contend with. Here, the court need deal only with intangibles, with rights which are a process of determination by the judicial mind. The facts are not altered. The rescission requires the mere mental operation of applying certain legal principles to the same facts, which could have been susceptible to other definition

had the parties made an effectual contract altering these otherwise established principles.

The second vital error in the reasoning of the learned District Judge is that he speaks of the rescission as relating back only to the *"claims" arising* subsequent to the happening of the accident. Of course, the rescission does not merely place the parties in the positions arrived at after the accident. The rescission nullifies the contract from the beginning. The contract intended a surrender of the original right from the time when the contract was made. The rescission was a restoration of the original right from the time when the contract was made. The employer, having breached the contract, it is to be regarded as a nullity from the beginning, as if it had never been made.

The foregoing analysis of the reasoning of the learned District Judge upon this view of the case was made to the Circuit Court on appeal, and Judge Learned Hand in writing the opinion of the Circuit Court did not adopt the view expressed in the decision of the District Court, but adopted, instead, certain other views, which the learned Circuit Court held to excuse those acts of the petitioner, which were hostile to the carrying out of the Workmen's Compensation contract. In summary, these were:

FIRST: That although, in the Court's opinion, it is a fiction to say that the parties truly contracted, yet, nevertheless, that inasmuch as the Laws of New York and New Jersey both treated the relation of employer and employee as to compensation, as being a real contract, that the latter view would be accepted.

SECOND: That the claimants were held up for only ten months, but no longer, because the company's advocate declared on the first day of the trial that it stood ready to pay Workmen's Compensation to all its employees. That the claimants thereupon repudiated compensation awards and demanded damages, and that, in consequence, the company's action had not prejudiced the claimants' rights.

THIRD: That while a delay in payment for ten months may be a substantial breach in this case, it was excused, because the injunction order of the Court insulated the company from legal liability, citing cases where persons aggrieved have sued for damages arising from torts, and, in one instance, from breach of contract, and have been denied a recovery in their damage suits because the tort or breach complained of was committed pursuant to a court order.

FOURTH: That certain of the claimants, by making claims or suing for damages, had likewise breached the contract.

FIFTH: That many of the parties appeared in the admiralty proceeding by administrators appointed in New York, and that the administrators, as representatives of the parties claimant, could not act to disaffirm a contract, wherein they were only the representatives of the beneficiaries, rather than the beneficiaries themselves.

SIXTH: That the claimants deny the application of the Compensation Act in any event, and, therefore, cannot disaffirm a contract to which they deny existence.

For all of the foregoing summarized reasons, the learned Circuit Court opinion holds that the regular employees were therefore correctly limited to compensation.

Answering the stated reasons from the opinion of the learned Circuit Court, as hereinbefore summarized, in the same numerical order, counsel respectfully begs to point out:

FIRST: That the learned Court is correct in observing that the relation between the employer and employee established by the Jersey Compensation Act is treated as one of contract by the State Courts.

SECOND: Counsel most certainly cannot concur in the conclusion of the learned Circuit Court that the petitioner's

advocate proffered the remedy of Workmen's Compensation to its employees at the time of the trial, and that the claimants were thus in fact held up by petitioners act only for a period of ten months. A reading of the record as to this offer, beginning at folio 865, at the top of page 289, Vol. II, and extending to folio 868, will show that no offer was made, of which either any, or all of the employees, could have availed themselves.

It is true that counsel for the petitioner expressed his appreciation of the hardships imposed upon many of the claimants. Whether he referred to their plight, as arising from the strategy of the petitioner in invoking the Limitation of Liability Act, it is hard to say, although in the next sentence he says that the claimants have no legal right to any recovery whatsoever against the petitioner. Counsel for the petitioner then adds, and, as a matter of pure charity, if we assume the truth of the prior statement that nothing at all is legally due, that the petitioner is willing to pay to each of the claimants what he or she would be entitled to receive under the New Jersey Workmen's Compensation Act. This sentence, taken as it stands, independently and by itself, might be construed as an individual offer to each of the compensation claimants, except that, if the Circuit Court opinion is correct in one of its other conclusions, the parties present, as appointed administrators of decedents, were not parties to the compensation contract to whom the offer could be validly made, or who could validly accept the same. However, this alleged offer of the advocate for the petitioners is not to be considered apart from the context, and if we read on through the next two folios, it is clear that it was no offer at all. For, the advocate for the petitioner states at page 289, Vol. II, folio 867:

> "I make that as an offer, and I only want to qualify it to the extent, that the petitioner does not feel that it should pay compensation on that basis and also have to go through a prolonged and very burdensome litigation."

and further at the beginning of folio 868:

> "But we feel that we would much rather pay something to these claimants than to spend an enormous amount of money in litigation, if there is any way that it can be arranged."

The proposal of the petitioner's advocate, therefore, was only that it would pay compensation to those who might be entitled to compensation by reason of actual employment, in the event that all of those who were non-employees and all of those who were maritime employees, both of which latter groups were entitled, in any event, to a recovery of full damages on the basis of common law liability, would also consent to accept the measure of relief given by the New Jersey Compensation Act. If a single claimant of these two latter groups of claimants refused to accept the proposal, then the prolonged and very burdensome litigation would, of necessity, go on. No true offer was made to any possible Workmen's Compensation claimant, when the blanket offer made depended for its acceptance on the condition that all of the other claimants, not only in the same category, but in two entirely different categories, with differing rights and remedies, should likewise accept the proposal. This was no *bona-fide* offer.

As a matter of ordinary experience, the advocate for the petitioner knew perfectly well that with so many diverse claimants, represented by many different lawyers, all with varying views and judgments, that an accord of all the claimants, through all their legal advisers, on such a basis, would be quite improbable. This was not an offer which one or all of those claimants, who might ordinarily come under the Workmen's Compensation Act, could accept, because of the attached condition requiring the assent of many other claimants that they likewise would be bound to the terms of an act which was not controlling on them under any circumstances. It is difficult to understand why this should be considered as a formal tender in Court, in any event. There

are prescribed ways of making a formal tender of legal significance, and these were certainly not adhered to. All that this statement of the petitioner's advocate amounted to was an invitation to everyone to negotiate a settlement of the litigation in hand. Such offers of settlement are made in and out of court in almost every case of this character, and are always considered to be without prejudice to the rights of the parties, and to be of no legal or procedural significance whatever. This offer of settlement, conditioned as it was upon the like acceptance of many parties, who had the right to reject it, or to ignore it, cannot be exalted to the significance of a restoration to the Workmen's Compensation claimants of rights of which they had been deprived for the preceding ten months, and which privation had required them, against their will, to prepare evidence and to come into Court to litigate the issues of the privity of the owner as to negligence in a Limitation of Liability proceeding.

The offer of the petitioners at that time, in the form made, availed the Workmen's Compensation claimants nothing, and could not avail them anything in the absence of the consent of all the other claimants in the proceeding, and the offer did not result, and could not have resulted in the vacating of the restraining order, and did not relieve the Workmen's Compensation claimants from the necessity of proceeding with the litigation for a full period of more than four years, and of establishing by proof, the negligence of the petitioner, in order to prevent its enforcement of limitation, and did not prevent the need of the claimants thereafter to present their proof and make out their claims, as a basis for the awards that were given.

The nature of the proposal of the company's advocate is further made clear by his suggestion that, in such event, a commissioner in admiralty would be required to compute the awards of the common law claimants, on the basis of a compensation settlement. This would have been necessary to the carrying out of such a blanket settlement because, of course, the New Jersey Compensation Bureau could not make or enforce any awards in favor of non-employees.

Mr. Axtell, as an advocate representing some of the claimants, referred to the proposed basis of an offer of settlement in his opening statement on the trial. He argued that the New Jersey Compensation Act did not govern under the circumstances of the case. Apparently the learned Circuit Court seems to have considered this statement, made in argument, to be binding in effect not only upon the clients of the particular advocate, but also upon all the claimants and all their advocates. For, the opinion twice adverts to the fact that the claimants took the position that the compensation act did not cover their case at all. It seems to be inferred that Mr. Axtell's statement, in argument, bound the claimants as a whole so as to effect a bar to the adoption of any contrary view on their behalf. Of course, this cannot be true.

Statements made by an advocate representing certain claimants and the administrators of the estate of certain other deceased claimants, need not necessarily be considered as a technical commitment of the advocate's own clients to this sole legal position, let alone binding claimants and estates represented by other advocates, who remained silent, for the reason that the statements of counsel warranted no response. The position of claimants and their counsel was not affected by what their individual views might be. Views of counsel, as to their rights, were secondary to the order of the Federal Court, which was extant, and which compelled and required the claimants to come into the Admiralty Court and defend their rights and prove their claims, and this they did without the opportunity of exercising any alternative.

THIRD: The learned Circuit Court concedes that a delay in payment for ten months might be a substantial breach. Inasmuch as the abortive offer of a group settlement to all claimants did not terminate or mitigate the actual delay one single mite, it is respectfully submitted that the actual delay of over four years was, indeed, a very substantial and very inexcusable breach. The learned Court rests its opinion, that the petitioning company was insulated from reaping any of

the effects which such a breach would seem to warrant, on the ground that the act of delay was the act of the Court, which is not a juristic person. The learned Court cites the line of cases which have held that a party who is tortiously injured by a litigant, when the litigant is acting pursuant to a Court order, cannot sue the litigant to recover damages.

It is respectfully submitted that while the law of these cases cannot be controverted, yet, nevertheless, they have no direct application to the case at Bar. These claimants are not here suing this petitioner for the damages arising from its act done pursuant to a court order, and the very fact that they cannot institute suit against the petitioner for damages for breaching its contract is and added reason why they should secure the equitable relief that they ask at the hands of this equitable court.

The claimants here simply assert, that, while it is true that they cannot sue the petitioner for damages for its breach of the contract of Workmen's Compensation, yet, it is nevertheless true that the contract is breached, and the contract is breached by the act of the petitioner, and a breached contract may be regarded in this, an equitable court, as a nullity, and hence, no barrier standing in the way of the power of this Court to award full damages to these claimants at common law, in accordance with the intention and design of the Limitation of Liability Act, and the equitable principles developed in connection therewith.

The learned Circuit Court points out that all of the cases cited, but one, sounded in tort, and the one case which related to a breach of contract was the case of

Bedell v. *Harris*, 229 Appellate Division [New York] 529.

An examination of this case discloses that it likewise was an independent suit brought to recover damages against the party breaching the contract. The defense was that the breach was supported by the injunction of a Court order, and that in securing the injunction, the defendant had been

required to give a bond, the amount of which was a limitation upon the right of recovery of the suing party. The added element of the posted bond, as a resource of the aggrieved party, is a sufficient ground for the differentiation of this case, aside from the fact that the case is likewise distinguishable from the case at bar, as are the tort cases, by reason of being a suit brought to recover damages arising from the courts act. Nevertheless, it is interesting to note that the decision, which is the sole discoverable decision on this point in a contract case, was by a divided bench of four justices to three. The three dissenting justices included the Chief Justice, and the dissenting opinion held the prevailing opinion to be contrary to the case of *New York* v. *Brown* in the New York Court of Appeals, 179 N. Y. 303. Although more than Three Hundred Thousand Dollars was involved, no appeal was ever perfected to the Court of last resort. The learned Circuit Court herein agrees with the four prevailing justices, and finds that the three dissenting justices were in error in their reliance upon the *Brown* case. It is noted that the learned Circuit Court cites no precedents for the proposition that a court of equity cannot, in arriving at a complete and equitable adjudication between parties before the court, disregard a contract which one or both of the parties have nullified by a breach or by a repudiation.

FOURTH: The contention of the learned Circuit Court that those who had already made claim, or sued for damages, committed the first breach, and so were precluded from disaffirmance of the breach by the employer is answered in the opinion of the learned Court. It must be borne in mind that except for a few claimants for injuries, of a relatively minor character, the great majority of the claims all arose by reason of the death of alleged employees. If any actions at law were instituted, they were, of necessity, instituted by duly appointed administrators of the estates of the decedents. The learned Court points out that these administrators were not the parties entitled to compensation under the New Jersey

Compensation Act, and, therefore, any act of any such administrator could not be a breach of a contract to which they were not a party.

FIFTH: As to the contention that the claimants never manifested any intention to disaffirm "as they must do in their suit, or before", this, again, is a rule obviously referring to those instances where a party to a contract has brought suit to recover damages for its breach. This equity court is not here concerned with the technical requirements of a suit at law. Counsel reiterates that this is not the situation here. These claimants are not bringing suit for damages caused by the breach of a contract. The claimants simply contend that, inasmuch as the employer obviously breached the contract, and, inasmuch as the employer brought all parties and claimants into concourse, this equity court, by reason of the breach, should justly treat the contract as a nullity and do justice in this equity proceeding. This does not require any further act on the part of the claimants. The court has already acted for them by enjoining them from every act contrary to the carrying out of the Limitation of Liability proceeding. By reason of the injunction, the claimants were perfectly in the right in doing the very thing that the court directed. They came into admiralty and met the issue of negligence advanced by the petitioner, and then, pursuant to the Court's direction, proved their claims, and when it came to the proving of the claims, the claimants, in person, who were the alleged beneficiaries under the Compensation Act appeared and established their claims by proof in the admiralty proceeding. Having done this and consumed a period of four years in time and much labor, effort and expenditure in addition, how can it be equitable treatment to require them to turn from this court without resource, and require them to prove and establish their claims all over again in a Workmen's Compensation proceeding?

SIXTH: The opinion of the Circuit Court goes on to say that the claimants never manifested any intention to disaffirm the contract, and that they never supposed that the Compensation Act covered their cases at all. Surely, the mental operations of the claimants are hardly to be given any legal significance! As hereinbefore stated, they had no alternative in the matter but to accept the orders and directions of the Admiralty Court and submit to the will and authority of its jurisdiction.

POINT VI.

The exceptional power of the Admiralty Court to bring the claimants for the death of employees into concourse against their will and prevent them from establishing their claims elsewhere, and to irreparably damage them as to their alternative rights, carries with it the power to make a complete and just disposition, with all the ease with which rights can be adjusted in equity, particularly when this result can be achieved by an obvious application of the well-known doctrines of estoppel and of election of remedies.

See:

Hartford Accident Company v. *The Southern Pacific*, 273 U. S. 207.

In the judgment of counsel, the whole situation here reduces itself to a single simple principle which must needs be employed to prevent interminable litigation, if there is to be any justice, and that is the doctrine of equitable estoppel. If a litigant can proceed on one set of facts and one body of law, and stand on that law, and stand on those facts for

several years of litigation, and if, thereafter, the same litigant can deny the very law upon which it relied and litigated during this protracted period, and, instead, set up a new interpretation of facts and a new set of legal rules, which contradict and effect the facts and rules, which it originally accepted, merely because the litigant could not win the encounter under the facts and the rules first laid down by itself, why then the administration of justice becomes pure legal legerdemain. To speak figuratively, the claimant, thinking to have located the shell under which the pea has been placed by her gambling antagonist, is permitted to discover, to her amazement, that the pea is under still another shell, than the one where she was led to believe and indeed, forced to conclude that it was situated.

It was this very situation which is existent in this case, which gave rise in our Courts of Chancery to the principle and doctrine of estoppel. Without the application of the principle of estoppel, litigation would be interminable, and there would be no justice. This was recognized by Mr. Justice Taft in his decision in the *Hartford Accident Company* case, and it is also recognized in the law of contract in the doctrine with respect to breach and estoppel, and whether we apply the appropriate doctrine of contract to this situation, or whether we apply the plain every day equitable doctrine of estoppel in this, an equity court, the result is the same. The one chain of reasoning fortifies the other, and both lead to the same conclusion.

Surely, an equity court has the right and the power and, indeed, the duty so to reason and to make findings to this effect. An equity court is not so weak that it cannot enforce a right and so, in turn, enforce a claim, which is existent in law, except for a faithless contract, from which the faithless party seeks to benefit.

The conclusion of the learned lower courts sitting in the equitable jurisdiction of admiralty, is that although one party breached its contract, repudiated its duty, and ob-

structed progress "for a considerable time", yet, nevertheless, the other party is bound in exactly the same way as if there had been no breach, no repudiation, and no obstruction. Can this be equity? Can a party eat his cake and have it too? Can one gain all the benefits of breaching a contract and then gain also all the benefits of enforcing it? This is what the petitioner here has done. It has pursued and is still pursuing its rights at law in violation of the alleged compensation agreement. In the same breath it holds the claimant to the breached contract. After four years of litigation, the petitioner ousts the claimant with a valid claim, bare handed, from the court where it has compelled the claimant to litigate. This is not fair; it is not just; and it is not equitable.

Surely, a limitation proceeding of this nature, being an equitable proceeding, cannot be employed as an instrument of injustice, and the petitioner here having restrained these widows and their dependent children from securing justice in any other tribunal cannot, after a lapse of almost four years, ask the tribunal to reject their claims and start all over again elsewhere, in a vain search for a modicum of justice. There has been an election by the employer, between inconsistent remedies, and the employer, having forced the claimants to accept the election, should be estopped from rejecting the remedy of its own choosing.

POINT VII.

The admiralty jurisdiction extended to the claims of all persons upon the boat, to the exclusion of the Workmen's Compensation Act, independently of the act of the petitioner, in bringing the claimants into a limitation of liability proceeding.

In claiming that the men on this boat had no initial rights in admiralty arising out of this disaster, and that the rights in admiralty were the sole avail of the ship owner initially, the petitioner is going a step further than it seems to counsel this Court has ever gone in limiting the admiralty jurisdiction, by reason of the existence of Workmen's Compensation Acts.

The petitioner has urged this by combining the effect of two lines of decisions. One of these lines of decisions has arisen in this Court. It has been held that an injury to an employee is non-maritime unless there is concurrence of the two elements of the locus afloat, and of the maritime character of the employment. The other line of cases have been adopted by State Courts, with no thought of the effect of the combination of their application in conjunction with the foregoing stated federal rule. This line of state cases hold that when an employer furnishes a conveyance to carry its employees to the plant, that the conveyance is an extension of the plant, so that the employment begins with the beginning of the conveyance. By the combination of these two rules, we may arrive at the result that those persons who would otherwise have the status of passengers upon a boat, and, who, with the status of passengers, would have the right of resource to the admiralty jurisdiction, are not passengers at all. It is respectfully submitted that this is the extension of a fiction to the breaking point, and that the admiralty courts should

not relinquish the right to determine claims between passengers on shipboard and the ship when the rights of these persons, as passengers, are violated. Uniformity of admiralty law requires that jurisdiction in such instances should be preserved.

This admiralty court need not accept the state court doctrine of treating the employer's conveyance as an extention of the plant for purposes of applying the Workmen's Compensation Act. The contract of compensation became effective only when there was a contract of employment. These men worked by the hour, after punching a time clock. The contract of employment was made daily and was a promise on the one hand accepted by an act on the other. The act was that of the employee in punching the time clock and commencing work. Failing this, he could collect no pay on a contract of employment. Failing this, there was no contract of employment. Therefore, it is correct to find that these men were not employees subject to the New Jersey Compensation Act while crossing this river.

On the other hand, if we accept the theory that these men entered into the employment of the master when they entered the boat, then it is evident that they were employed to take a maritime voyage, as one of the incidents of their employment, and the mere fact that they were sitting idly in the boat, does not say that they were not engaged in maritime employment. On the contrary, they were carrying out the maritime employment of taking a voyage across the river. This fact gives a maritime color to the character of their employment. At the time they were engaged in a maritime venture, and, as participants in a maritime venture, they had the right of relief in a maritime court, and any contract as to Workmen's Compensation which they entered into, did not apply to such part of their work as partook of the nature of a maritime venture. Likewise, if the contract was thus one made in New York, it is not varied, necessarily, by the provisions of any New Jersey statute.

Conclusion.

The decision below in so far as it affirms the decree of the District Court as to the dismissal of certain claimants should be reversed with costs, and complete relief granted to the petitioning claimants herein under the mandate of this Court.

Respectfully submitted,

LESTER HAND JAYNE,
Proctor for Claimant-Petitioner,
Nora McEachin, as Administratrix, etc.